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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 639

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA,
STEWART L. UDALL, Secretary of the Interior, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Washington Metropolitan Area Transit Commission, petitioner, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit which was entered on June 12, 1968.

OPINIONS BELOW

The opinion of the District Court is reported at 268 F.Supp. 34, and is set forth in the Appendix hereto, pp. 26-59, and the order of the Court of Appeals reversing the

order of the District Court is set forth in the Appendix, pp. 17-25.

JURISDICTION

The order of the Court of Appeals was entered on June 12, 1968. A petition for rehearing *en banc* was denied on August 5, 1968; two judges would have granted rehearing, four judges declined rehearing, and two judges did not participate. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Are regulations of the Secretary of the Interior unlawful when they employ the double standard of (a) prohibiting one bus carrier from operating at all on a public road, (b) permitting another carrier to operate 52 daily trips, but restricted as to their use *after* they leave that road, and (c) allow others to operate more than 800 daily trips on an unrestricted basis, when all of the buses have identical physical characteristics and perform an identical service?

II

May the Court of Appeals reverse a District Court's decision that the evidence does not show a rational basis for discriminatory regulations, when that reversal is predicated and bottomed on evidence outside the trial record?

III

May an appeals court base its decision on "opinion" evidence never adduced at the trial?

IV

When the Secretary of Interior is authorized by law to establish regulations necessary or proper for the use and management of a Parkway under his jurisdiction, and he promulgates a regulation authorizing a carrier to use that Parkway enroute to an area off of the Parkway for a stated

purpose, does he exceed his authority when he also attempts to control the use of the carrier's vehicles *after* it has fulfilled that purpose?

STATUTES INVOLVED

The primary statute provisions involved are:

Act of August 25, 1916 (39 Stat. 535 as amended, 16 U.S.C. §§ 1, 3).

The primary regulatory statute provisions promulgated by the Secretary of the Interior which are involved herein are:

36 C.F.R. § 50.36(b)(3)(i).

STATEMENT OF THE CASE

A highway runs along the Virginia side of the Potomac River from the Beltway on the north to Mt. Vernon on the south. This road, the George Washington Memorial Parkway (Parkway), is owned by the United States and under the control of the Secretary of the Interior (Secretary). Regulations governing the use of the Parkway have been promulgated by the Secretary, including its use by buses.

The scope of these regulations may be briefly summarized. South of Memorial Bridge the road is open for use by all types of buses—commuter buses, sightseeing buses, airport buses, charter buses; of just the commuter buses, there are more than 800 daily trips. North of Key Bridge the Secretary's regulations permit unlimited use of the road by airport buses and sightseeing buses. However, severe restrictions are placed on its use by commuter buses. The W. V. & M. Coach Company is permitted to run commuter service to the CIA Building and return directly, but they may not go beyond the CIA Building to serve Virginia suburb areas. These buses load in the District of Columbia, then enter the Parkway. There is no pickup or discharge of passengers on the Parkway. The buses leave the Parkway and enter the CIA grounds. After this service was established, the W. V. & M. Coach Company received addi-

tional certification from the Transit Commission to extend the service from the CIA to serve points in the suburban northern Virginia areas. D.C. Transit System, Inc., also received certification from the Transit Commission to transport passengers from Maryland and the northwest portion of the District of Columbia over the Beltway and the northern portion of the Parkway to the CIA. However, the Secretary's regulations prohibit any commuter service on the Parkway between the CIA and the Beltway. On the other hand, about 200 airport and sightseeing buses use all portions of the northern part of the Parkway daily under the Secretary's regulations.

This action arose below in May, 1963, when the United States sought to block the commuter service *beyond* CIA as being in violation of its regulations. W. V. & M. Coach Company brought a counteraction. D. C. Transit System, Inc., the Transit Commission, and the state Corporation Commission of Virginia became parties to this consolidated action either as parties-defendants or by intervention.

Early in the litigation, the United States filed a motion for summary judgment. That motion was denied February 28, 1964.

Trial commenced in November, 1966. On April 13, 1967, the Trial Court, Judge Sirica, entered its opinion, together with its "Findings of Fact" and "Conclusions of Law." A final order was filed June 9, 1968.

The District Court stated that all parties were in accord with the legal principles[1] by which the case was to be resolved. In essence, the regulations could be declared invalid only if they lacked "a rational basis," were arbitrary or beyond the Secretary's authority. The Trial Court thus posed and answered the issue:

> In view of the broad discretion vested in the Secretary and the Park Service, and in view of the limited role of the reviewing Court, does the evidence show a rational basis for the regulations here in issue? I

---

[1]Acknowledged by the Court of Appeals to be correct.

> conclude that the evidence does not show a rational basis for the regulations as they now exist. (App. p. 40)

In its opinion, the Trial Court noted that certain affidavits of the Secretary and others had been filed in support of the government's motion for summary judgment. After reciting the denial of the motion, the court went on to state that "[s]ince the affidavit of the Secretary was not introduced into evidence, it cannot be considered by the Court."

After reciting the contentions of the Secretary, the Trial Court rejected them, stating that they are "clearly wrong" and that the weaknesses of the argument are "so manifest that the Court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the Act of Congress." (App. p. 42.)

Again, at page 43, the court said that the Secretary's

> "theories do not have substantial evidence in the record to support them and they do not provide a rational basis for the unfair and discriminatory double standard regulations which presently apply to the suburban buses using the Parkway. These, nevertheless, are the contentions advanced by the government and I have no alternative but to invalidate this regulatory pattern in the absence of a rational basis in the evidence of record."

The District Court opinion was reversed by a panel of the United States Court of Appeals for the District of Columbia Circuit, by a split decision, Judge Tamm dissenting.

Relying almost exclusively upon the opinions set forth in the affidavit of the Secretary, the Court of Appeals felt that "the Secretary's discrimination in the use of the Parkway has a rational basis in the record" for the regulations. Judge Tamm, in dissenting, stated that he concurred in the District Court's finding that the regulations lacked a rational basis, for "it is inconceivable to me that the Secretary is able to justify as reasonable and authorized in law, his action in permitting two other bus operators to route identically

constructed buses over the Parkway while refusing to permit a third operator, *id est*, [W. V. & M.] Coach Company also to operate thereupon."

A petition for rehearing *en banc* was declined; two judges stated that they would grant the petition, four judges voted to deny the petition for rehearing, and two judges did not participate.

REASONS FOR GRANTING THE WRIT

The petitioner here is a regulatory agency charged by law with protecting the public interest in the field of public transportation in the Washington Metropolitan Area. Its role in the proceedings below was to protect the public's interest in conflict between the proprietor and a user of a public highway.

Our expressed position was that certain regulations of the Secretary of the Interior were not only contrary to the public's interest, they had no rational basis behind them and were so discriminatory that they were clearly arbitrary and capricious. Sustaining the regulations will deprive hundreds of people of an adequate means of public transportation.

When the regulations were challenged, the District Court invalidated them in a painstaking and illuminating opinion.

As will be shown, there is a "very obvious and exceptional showing of error" upon the part of the Court of Appeals. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S. Ct. 535 (1949). We submit that the action of the Court of Appeals was so contrary to both the facts and the law—and so damaging to the interest of a large segment of the public—that it must be reversed. In fact, its decision is so unfair and erroneous that this Court should not only reverse, it should summarily affirm the order of the District Court.

I

THERE IS NO "REASONABLE BASIS" FOR ADMITTED DISCRIMINATION

It seems patently arbitrary to impose the artificial restriction embodied in the Secretary's regulation. The very notion that buses are somehow more objectionable than automobiles on such a road is highly questionable. The modern bus is an attractive vehicle; it moves at high speed along with other traffic; its noise and fumes, particularly at highway speeds, are no worse than that of automobiles. Moreover, there are positive benefits which flow from bus usage of the highway in question. More detrimental to enjoyment of the scenic values of this road than the appearance of buses is the congestion of the roadway by commuter traffic. Each loaded bus can reduce the number of automobiles on the road by fifty or more and add significantly to enjoyment of the road by all.

Even if it were true that buses are somehow esthetically less desirable than cars, the Secretary's action would still be completely unreasonable. He has not kept all buses off the roadway. He permits airport and sightseeing service, in vehicles substantially identical to those used for commuter runs. Somehow, though, the commuter buses are objectionable while the others are not. Indeed, he even permits commuter runs provided they end at CIA. *Hence, the 52 commuter buses now using the Parkway will continue to do so if the regulation is upheld.* The only difference will be that they must terminate at CIA instead of going beyond that point on other roads to provide better service for Virginia commuters. Thus, the Secretary's regulation will not even have any significant impact on the actual bus usage of the Parkway. It will only diminish the quality of service beyond CIA. This can only be regarded as patently capricious. Moreover, it exceeds his statutory authority.

The Secretary's position, moreover, ignores a fact which is known and obvious to everyone familiar with this area.

The Parkway north of Key Bridge is not simply a scenic highway for the enjoyment of sightseers.[2] Anyone who travels it during the peak hours for travel between home and work is forcibly made aware that it is a major corridor for commuters[3] in this area. There is no justification whatever for discriminating against use of the highway by bus users. The mass transit rider is entitled to the same consideration and facilities as the automobile driver. This is a clear case of a denial of the use of public property to one class of citizens as opposed to another, *Sproles v. Binford,* 286 U.S. 374, 52 S. Ct. 581 (1932).

The court of appeals stated that there was more to the Secretary's "rational basis" than just his conclusion that the buses were unsightly: "'. . . the compelling necessity to provide CIA employees swift and immediate access to their Agency'" requires "that direct commercial transportation to the CIA Building should be permitted on the Parkway." (App. p. 22.) On December 12, 1962, D. C. Transit was refused a permit to carry CIA employees over the Parkway to the CIA, despite a Transit Commission finding that "the Parkway offers the most direct and shortest route, the fastest and more efficient service, and just as important, the safest route." This can only be "arbitrary bureaucracy masquerading as reasoned judgment.[4] Once again we find a crass example of a "double standard"; again, we find the reasoning of the Secretary being applied to one person and withheld from another.

A further illustration of the arbitrary nature of the regulations in question is the different treatment accorded the Parkway section below Memorial Bridge. There, full usage by commuter buses is allowed. Yet, as the trial judge found, that section is fully as scenic, if not more so, than the section above Key Bridge.

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[2]A finding of the Trial Court (App. p. 43).

[3]For graphic proof, see W.V. & M. Exhibits Nos. 37 and 38, motion pictures of the rush hour traffic on the Parkway.

[4]Judge Tamm, dissenting in court of appeals decision.

The Commission is itself an independent agency whose decisions are subject to judicial review. We would be the last to suggest that the exercise of administrative discretion be lightly overturned by the courts. Occasions do arise, however, when an administrator falls into error and renders an arbitrary and capricious decision. This is patently one of those situations. The Secretary's attempt to bar a limited group of commuters from the use of the Parkway is discriminatory, capricious, and contrary to sound public policy. The distinctions he draws against buses in general, and against a certain limited class of commuter buses in particular, are indefensible.

This is not to say that the Secretary is powerless to protect his highway from excessive burdens or to maintain it in a safe and good condition. There are ways and means to regulate the use of the highway by buses. The regulations employed here are, however, a denial of the use of the road by one member of a class, while other members of that class are permitted an unrestricted use. This Court in *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, indicated such arbitrary discrimination could not stand.

The limitation of the regulation has "no appropriate relation to highway protection." *Sproles v. Binford*, 286 U.S. at 394, 52 S. Ct. at 587. The regulations do not limit or even attempt to define the number of trips the carrier may operate over the Parkway to the CIA, which is not on the property administered by the Secretary. Hence, under the regulations, the carrier could double the number of daily trips operated between the District of Columbia and the CIA.

Nevertheless, the Secretary insists that the vehicles must turn around at the CIA and return directly to the District of Columbia.

Why does he insist upon this? The record, even if it included his affidavit, is completely barren of any fact which might supply an answer.

II

THE COURT OF APPEALS' DECISION NOT ONLY IGNORES THE ACTUAL EVIDENCE, IT IS FORMULATED ON A DOCUMENT NOT IN EVIDENCE

The Trial Court recognized that the parties were not at issue over matters of law. The trial court stated, "What the issue comes down to is this: In view of the broad discretion vested in the Secretary and the Park Service, and in view of the limited role of the reviewing Court, does the *evidence* show a rational basis for the regulations. . .?" (App. p. 40) (Emphasis supplied)

A. Evidence Not in the Record

The trial court then reviewed the evidence to support the two concepts argued by the Government as the "rationale" or "rational basis" of the regulations. The trial court found that the "scenic value" and "old highway-new parkway" theories ". . . *do not have substantial evidence in the record to support them*. . . ." (Emphasis added)

Significantly, the Court of Appeals, in reversing these evidentiary findings, relies not on the evidence adduced during the trial, but falls back upon the depths of the pretrial pleadings for an affidavit attached to a motion—a motion denied almost two years prior to the trial. Despite the express finding[5] by the trial judge that the affidavit of Secretary Udall "was not introduced into evidence" and "it cannot be considered by this Court," the majority decision of the Court of Appeals initiates *its* discussion of the case by declaring that the "Secretary explained his reasons for the regulations in an affidavit. . . ." (App. p. 21.) That the document is the very crux of the Court of Appeals' opinion is glaringly apparent, for repeatedly the court refers to or quotes from it. (App. pp. 21-22.)

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[5]This finding was not challenged by the United States in its appeal to the District of Columbia Circuit Court.

Uncontradicted evidence strongly supports District Judge Sirica's findings. The United States simply failed to make out a case for sustaining the Secretary's regulations. This failure was not due to lack of opportunity to present evidence, including the calling of the Secretary to the stand.

The essential predicate for upholding the regulations is the Secretary's affidavit. The non-evidentiary status of that document, seemingly a condition precedent to its use, the court of appeals avoids. It simply assumes, without overruling the District Court, that the affidavit was part of the trial record.

In *Federal Trade Commission v. Universal-Rundle*, this Court, in setting aside a Court of Appeals' decision on other grounds, stated that it was improper for the lower court to reach questions raised by "post-proceeding" evidence. 387 U.S. 244 at 252 (n.5), 87 S. Ct. 1622, at 1627.

The logic of this rule applies equally as well to pretrial affidavits, especially where attached to motions which are denied before trial.

Fundamental concepts of fairness preclude reliance upon such untested documents. The petitioner had absolutely no chance to "test" the statements—which were mainly opinion—contained in the affidavit. In short, we have been denied the most basic concept of due process of law.

B. Improper Review

The standards by which the Court of Appeals conducted its review are not articulated in its opinion. While the opinion is silent as to the standards employed, it is readily apparent that certain standards were not used.[6] For exam-

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[6] "Findings of fact by the trial judge are presumptively correct and are to be accepted by reviewing courts unless clearly wrong." *Butte and Superior Copper Co. v. Clark Montana Realty Co.*, 249 U.S. 12, 30, 39 S.Ct. 231, 236; *Baker v. Schofield*, 243 U.S. 114, 118, 37 S.Ct. 333, 334; *District of Columbia v. Pace*, 320 U.S. 698, 64 S.Ct. 406.

ple, the Court of Appeals does not say that the lower court's findings lack substantial evidence or are "clearly erroneous."[7] Surprisingly, it does not even discuss the evidentiary status of the Secretary's affidavit.

The inescapable conclusion to be drawn from the Court of Appeals' opinion is simply that the court tried the case *de novo*, relying almost exclusively on the unsupported opinions of the Secretary, as well as its own speculations.

For example, the Secretary is quoted as finding W. V. & M. buses to be unsightly and hence, aesthetically objectionable. Yet the trial court *found* that "the government has not proved that suburban commuter buses have any adverse effect upon scenic aspects of the Parkway at the time of day when such buses would be using it." (App. p. 37.)

The "scenic value" theory cannot be sustained in the face of the evidence, the Government admitted below that the southern part of the Parkway "is a scenic attraction which equals and perhaps surpasses the newer section above Key Bridge." Nevertheless, the majority blandly asserted that "aesthetic reasons" justify the double standards imposed by the Secretary, without commenting on the finding of the trial judge that his search of the facts for a rational basis revealed the contrary. The Court of Appeals declares that "252 buses are more unsightly and objectionable than 200."[8] No one so testified. Upon what evidence does the majority form this conclusion? Following the rationale of the majority, it would have been more logical for the Secretary to permit the 52 commuter trips and eliminate the 200 sightseeing, government, and airport trips.

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[7]"Findings of fact shall not be set aside unless clearly erroneous. . . ." Fed. Rules Civil Procedure, Rule 52(a), 28 U.S.C.A.

[8]In holding to the contrary, the trial court had before it actual pictures of the bumper-to-bumper, rush-hour traffic on the Parkway. It would be interesting to hear any *expert* witness attempt to substantiate this statement. Moreover, enforcement of the regulation would not eliminate the 52 W.V. & M. commuter trips; see discussion of this point, supra, p. 11.

The Court of Appeals then compounds its error by completely unfettering its imagination: "But even more important, the 52 trips . . . might well become several hundred. . . ." (App. p. 24.) This is pure conjecture, for there is no evidence to support this "straw man" the majority so vigorously attacks.

But assume, for the moment, that the conjecture had some substance to it. How does it vitiate the trial court's decision? Who would benefit from it? The Secretary allows over *800* commuter trips daily on the southern portion of the Parkway without, presumably, detracting from its equally scenic attraction. Moreover, additional trips would only enhance the quality of service available to CIA employees. The more one examines the "rational basis" of the Secretary, the less rational it becomes. And the more penetrating the analysis, the more apparent the "*de novo*" review of the reviewing court becomes.

Perhaps in recognition of the weakness of this argument, the Court of Appeals then stated that the Secretary "did not find that only W. V. & M. buses were unsightly," but that it was a "compelling necessity to provide CIA employees swift and immediate access to their Agency." (App. p. 22.) If this is so, upon what rational basis did the Secretary refuse D. C. Transit a permit to transport CIA employees over the Parkway to the Agency? The buses are identical; the class of passengers are the same; both services have alternate, but longer routes. This persistence in establishing double standards must be stopped; these flagrant discriminations compel this Court to take corrective action. Moreover, the Court should consider the novel concept of judicial review espoused by the Court of Appeals' decision, wherein a lower court is reversed simply because the appellate court does not agree with his interpretation of the evidence. The law cited by the reviewing court to govern the trial court in reviewing administrative action is reflective of an equally stringent standard of review by the appellate court. A *de novo* determination of the case based on evidence outside the trial

record simply does not comport with acceptable standards of judicial review.

III

THE COURT OF APPEALS FAILED TO CONSIDER WHETHER THE SECRETARY EXCEEDED HIS AUTHORITY

It was discussed earlier in this pleading that the transportation authorized by the Secretary began and ended off of the Parkway. The amazing thing about this controversy is that the Secretary is attempting to control the transportation after the vehicles leave the Parkway. And this, we submit, exceeds the scope of his statutory authority.

Congress has directed the Secretary of the Interior and the National Park Service to

> "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U.S.C. § 1.)

That Act also authorizes the Secretary to make "such rules and regulations" as are necessary for the use and management of those lands and parks. 16 U.S.C. § 3.

Claiming to act on the basis of the Congressional directive, the Secretary adopted certain regulations relating to the operation of commercial vehicles on the Parkway. As pertinent here, the regulations provided:

> "Section 3.36 is amended to read as follows:
>
> (b) *George Washington Memorial Parkway; passenger-carrying vehicles; permits, fees.* . . .
>
> (3) Passenger-carrying vehicles for hire or compensation, other than those to which subparagraphs (1)

> and (2) of this paragraph apply, may be permitted on the George Washington Memorial Parkway upon application for, and the granting of a permit by the Regional Director, National Capital Region, National Park Service under the following conditions:
>
> (i) When operating on a regular schedule (a) to provide passenger service on any portion between Mount Vernon and the Arlington Memorial Bridge, (b) to provide limited direct nonstop passenger service from Key Bridge to a terminus at the Central Intelligence Agency Building at Langley, Virginia, *and direct return*, and (c) to provide limited direct nonstop passenger service from the interchange at Route 123 to a terminus at the Central Intelligence Agency Building at Langley, Virginia, *and direct return*. (Emphasis supplied)

Once the Secretary allows the vehicle to be used on the Parkway, how does its subsequent use affect his statutory obligation to provide for the proper use and management of that public road? What difference does it make if, of ten passengers, eight are destined to the CIA and two are destined beyond? Will enforcement of the regulation reduce the number of commuter trips and still permit adequate service to the CIA? If it is important for CIA employees[9] to have "swift and immediate access to their agency," is it not equally important for the residents of northern Virginia to have a corresponding service? Or the residents of the District of Columbia who work in the Virginia suburbs? The answers to these questions should have been supplied by the United States, in order to correlate the restriction with the statutory authority. The United States simply did not meet the burden of proof, and the Court of Appeals misconstrued the function of judicial review when it proceeded nonetheless to speculate upon what might have motivated the Secretary. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, at 35, 87 S. Ct. 1792, at 1798 (1967).

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[9]The regulations do not restrict the service to employees; hence, the most casual visitor may be served.

In what manner restricting the use of the vehicle after it leaves the Parkway aids the Secretary in conserving the scenery or wild life has not been exposed in *this* record. On its face, the regulation appears to be "plainly and palpably inconsistent with the law," *Boski v. Comingore*, 177 U.S. 459, 470, 20 S. Ct. 701, 706 (1900), and should be invalidated.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed and the opinion and order of the District Court affirmed.

Respectfully submitted,

RUSSELL W. CUNNINGHAM
Attorney for Petitioner

October 8, 1968

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,394

STEWART L. UDALL, Secretary of the Interior, *et al.*,
Appellants

v.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC.,
Appellee

D. C. TRANSIT SYSTEM, INC., Intervenor

No. 21,395

UNITED STATES OF AMERICA, Appellant

v.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC.,
Appellee

D. C. TRANSIT SYSTEM, INC., WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, and VIRGINIA STATE CORPORATION COMMISSION, Intervenors

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Appeals from the United States District Court
for the District of Columbia

Decided June 12, 1968

Mr. A. Donald Mileur, Attorney, Department of Justice, with whom *Assistant Attorney General Martz*, *Acting Assistant Attorney General Harrison*, and *Messrs. Roger P. Marquis* and *Thos. L. McKevitt*, Attorneys, Department of Justice, were on the brief, for appellants. *Mr. J. Edward Williams*, Attorney, Department of Justice, also entered an appearance for appellants.

Mr. Manuel J. Davis for appellee and for intervenor D. C. Transit System, Inc.

Mr. Russell W. Cunningham, with whom *Mr. Renn C. Fowler* was on the brief, for intervenors Washington Metropolitan Area Transit Commission and Virginia State Corporation Commission.

Messrs. Wilmer S. Schantz, Jr. and *Samuel M. Langerman* were on the brief for intervenor D. C. Transit System, Inc.

Before PRETTYMAN, *Senior Circuit Judge*, and WRIGHT and TAMM, *Circuit Judges*.

WRIGHT, *Circuit Judge*: The facts of this appeal can be quickly stated. The United States owns and controls a strip of land which runs along the Potomac River on the Virginia side. Located on this strip is a multi-lane highway, known as the George Washington Memorial Parkway, which stretches from Mount Vernon at its southern end through the city of Alexandria, north through Arlington and Fairfax Counties, past Memorial and Key Bridges, to its northern end at the intersection of the Capital Beltway, Route 495. The Parkway is administered by the National Park Service of the Department of the Interior, whose Secretary has been charged by Congress to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments and reservations under the jurisdiction of the National Park Service * * *."[1]

Pursuant to this authority the Secretary has issued a series of regulations relating to the operation of commercial vehicles and common carriers on the George Washington Memorial Parkway. The regulations relevant to this appeal provide that passenger carrying vehicles for hire or compensation, other than licensed taxicabs and airport transport ve-

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[1] Act of August 25, 1916, § 3, 16 U.S.C. § 3 (1964 ed.).

hicles carrying fewer than 14 passengers, are permitted to use the Parkway only with a permit from the Regional Director of the Park Service and only under certain conditions. In essence, permits are granted for unlimited commercial bus service south of Memorial Bridge and, because of the condition of the road surface, no bus service is permitted from Memorial Bridge north to Key Bridge. North of Key Bridge sightseeing buses are allowed pursuant to a permit, as are buses operating nonstop to and from Dulles International and National Airports. But the Secretary's regulations forbid regular commuter bus service over the northern sector of the Parkway except for "direct nonstop passenger service from Key Bridge to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return, and (*c*) to provide limited direct nonstop passenger service from the interchange at Route 123 to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return."[2]

In 1961 Washington, Virginia and Maryland Coach Company, the appellee, obtained a permit from the Park Service to run its buses on the northern sector of the Parkway in a manner consistent with the Secretary's regulations. Then, apparently in 1962, it came to the attention of the Park Service that WV&M was not obeying the regulations in that, after making their runs to the CIA Building, its buses were continuing on into northern Virginia, collecting and discharging passengers, and then returning to the Parkway for the return trip south. This procedure violated its permit, which authorized only nonstop trips to the CIA Building and *direct return.*

After negotiation with WV&M, its permit was reissued with this requirement of direct return made even more explicit. Nevertheless, WV&M has consistently denied the validity of the regulations and has continued to violate their

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[2]36 C.F.R. § 50.36(b)(3)(i) (Supp. 1968).

terms. Consequently the United States brought suit to restrain WV&M from continuing its unauthorized operation of a suburban commuter bus service on the Parkway between Key Bridge and the CIA Building. D. C. Transit System, Inc., the parent corporation of WV&M, and the Washington Metropolitan Area Transit Commission[3] intervened as defendants. In answer to the suit, WV&M denied the validity of the regulations and counterclaimed for a return of fees paid to the Park Service. In a separate action in which D. C. Transit and WMATC joined as plaintiffs, it sued the Secretary of the Interior to challenge the validity of his regulations.

After the consolidation and trial of these cases the District Court ruled that WV&M was not entitled to refund of the $2,284 in fees which it had paid up to the time of trial to use the Parkway. It also denied the claim of the United States for injunctive and declaratory relief, ruling that the Secretary's regulations were "unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, insofar as they do not permit suburban commuter buses owned by W. V. & M. * * * to operate without limitation on the Parkway

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[3]The WMATC has authorized the WV&M bus service which the Secretary of the Interior has sought to curtail. But WMATC's argument as intervenor is only that the Secretary's regulations are unreasonable. The Commission has not urged that its authority overrides that of the Secretary. The trial court addressed itself to the issue of the relationship between the Commission and the Secretary, holding:

> "The Act of September 15, 1960 (74 Stat. 1031, 1037), creating the Washington Metropolitan Area Transit Commission (the WMATC) with authority to issue certificates of public convenience and necessity * * * in the Washington Metropolitan District, did not revoke by implication or supersede the authority of the Secretary of the Interior to promulgate reasonable regulations with respect to administration and use of the George Washington Memorial Parkway." *United States* v. *Washington, Virginia & Maryland Coach Co.*, D. D.C., 268 F.Supp. 34, 50-51 (1967).

This conclusion of law has not been challenged on appeal and is not now before this court.

above the Key Bridge * * *." 268 F.Supp. at 51. We affirm this decison with respect to the validity of the fees exacted, but reverse the denial of injunctive and declaratory relief.

In essence the trial judge felt that the regulations were discriminatory and invalid for two reasons: first, because they unreasonably allow unlimited bus service south of Memorial Bridge while limiting such service north of the Bridge[4]; and second, because they allow sightseeing, airport and CIA Building buses north of Key Bridge while prohibiting general commuter service on this section of the Parkway.

The Secretary explained his reasons for the regulations in an affidavit in support of the United States' motion for summary judgment. He felt that the use of the Parkway by "ever increasing numbers of commuter busses with their great bulk, trucklike characteristics, and odors, as is contemplated by the Washington, Virginia & Maryland Coach Company, would, in my opinion, physically damage the scenic value of the Parkway."

The trial judge, however, concluded that the Secretary's regulations were not reasonably related to his goal of preserving the scenic value of the Parkway. For he felt that the southern sector of the Parkway was more scenic than the northern sector[5] and consequently to allow unlimited

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[4]Below Memorial Bridge the Alexandria, Barcroft and Washington Transit Company operates about 820 regularly scheduled one-way trips per day. That so much bus service is permitted below Memorial Bridge while comparatively little is permitted above Key Bridge constituted to the trial judge "[t]he most glaring example * * * of the discriminatory effect of the regulations * * *." 268 F.Supp. at 40.

[5]The basis for this conclusion was the fact that, while thousands of sightseeing bus trips are made each year on the southern portion of the Parkway, only a handful venture to the north. But the riders of sightseeing buses may well be more interested in historic sites than in scenic beauty. This could well explain the sightseers' preference for the southern sector of the Parkway.

traffic on the southern sector, while prohibiting it to the north, was unreasonable. He felt also that, because the CIA Building, airport and sightseeing buses were physically identical with the WV&M buses, to bar the latter on the northern sector of the Parkway, while permitting the former, was unreasonably discriminatory. He emphasized that he could not "understand how 52 daily suburban commuter buses operated by W. V. & M. could be aesthetically objectionable when approximately 200 airport and C.I.A. commuter buses * * * are not aesthetically objectionable." 268 F.Supp. at 44.

The Secretary, however, did not find that only WV&M buses were unsightly. In his affidavit he "reluctantly" concluded, "after weighing the interest of the public in retaining the present natural beauty of the Parkway and its environs[6] as against the compelling necessity to provide CIA employees swift and immediate access to their Agency," that direct commercial transportation to the CIA Building should be permitted on the Parkway. Similar considerations prompted his decision with regard to the use of the Parkway for access to Dulles International Airport.

A rationale for the Secretary's distinction between the southern and northern sectors of the Parkway was offered by Robert C. Horne, Associate Regional Director of the Capital Region of the National Park Service. He explained that the portion of the Parkway between Alexandria and Mount Vernon was authorized in 1928 and constructed in 1932. It replaced a previously existing commuter railway, and there have never been any limitations on commuter bus

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[6]The Secretary pointed out in his affidavit that Congress had expressed its concern "that the scenery and natural objects found on the George Washington Memorial Parkway * * * be conserved * * *," citing act of May 29, 1930 (46 Stat. 482), and act of August 25, 1916 (39 Stat. 535), as amended (16 U.S.C. § 1).

service.[7] It provides the two entrances to National Airport and connects with several cross streets and bisects several communities south of Alexandria. By contrast, the Parkway north of Key Bridge is a limited access road with no intersecting cross streets. It is known for its scenic beauty and was constructed in part to accommodate CIA personnel. It replaced no existing commuter highways or railroads, and general commuter bus service has never been allowed on any portion of it.[8]

As the distinguished trial judge recognized, there is a judicial presumption of validity of administrative action, and the burden is on WV&M to overcome that presumption. *Duesing* v. *Udall,* 121 U.S.App.D.C. 370, 374, 350 F.2d 748, 752 (1965), *cert. denied,* 383 U.S. 912 (1966). The court should not seek to make a *de novo* determination, and it need not agree with the Secretary's judgment in order to uphold it. For where there is more than one solution to an administrative problem the court will uphold any one that has a rational basis. *Udall* v. *Tallman,* 380 U.S. 1 (1965). Here the task of weighing the competing uses of federal property has been delegated by Congress to the Secretary of the Interior. The balance which he strikes will not be judicially upset unless it is arbitrary or beyond his authority. *United States* v. *Shimer,* 367 U.S. 374, 381-382 (1961), quoting *Bates & Guild Co.* v. *Payne,* 194 U.S. 106,

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[7]The section of the Parkway from Memorial Bridge south to Alexandria was originally closed to commuter buses, but was opened to such buses in 1942 as a wartime conservation measure to provide service to National Airport, then under construction.

[8]The section from Memorial Bridge north to Key Bridge was opened to traffic in 1937. The section from Key Bridge north to Spout Run was opened in early 1951. It is the section from Spout Run north to the CIA Building that was opened in 1959, in part to provide easy access to CIA personnel. *See* HEARINGS ON THE 1957 SUPPLEMENTAL APPROPRIATION BILL (Act of July 27, 1956, 70 STAT. 678) BEFORE SUBCOMMITTEES OF THE HOUSE COMMITTEE ON APPROPRIATIONS, 84th Cong., 2d Sess., Part 1, pp. 247, 255, 273, 304 (1956).

108-109 (1904). "Error or unwisdom is not equivalent to abuse." *A. T. & T. Co.* v. *United States*, 299 U.S. 232, 236 (1936). Where administrative control has been congressionally authorized, the judicial function is exhausted once there is found some "rational basis" for the action taken. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-287 (1934). *See also Thor Westcliffe Development, Inc.* v. *Udall*, 114 U.S.App.D.C. 252, 314 F.2d 257, *cert. denied*, 373 U.S. 951 (1963).

Such a basis clearly exists in this case. The Secretary reasonably concluded that, for historical and aesthetic reasons, unlimited commuter bus traffic should be permitted south of Memorial Bridge but not north of it. Similarly he reasonably concluded that, while all buses north of Memorial Bridge did detract from the Parkway's scenic beauty, considerations of public interest compelled the allowance of the limited service the Secretary permits. The fact that WV&M now makes only 52 unauthorized commuter trips per day on the Parkway north of Key Bridge, while the airport, CIA and sightseeing buses make 200, is certainly not decisive. Two hundred and fifty-two buses, authorized or unauthorized, are more unsightly and objectionable than 200. But even more important, the 52 daily trips which WV&M now runs in violation of the law might well become several hundred were its operations sanctioned by the Secretary or, though opposed by the Secretary, "authorized" by the courts.

Since the Secretary's discrimination in the use of the Parkway has a reasonable basis in the record, WV&M must seek a political, rather than a judicial, solution to its problem.

Reversed.

TAMM, *Circuit Judge, dissenting:* I would affirm the action of the District Court. I agree with the knowledgeable trial judge that the Secretary's regulations are "unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, insofar as they do not permit suburban commuter buses owned by W.V.&M. . . . to operate without limitation on the Parkway above the Key Bridge . . . ." It is inconceivable to me that the Secretary is able to justify as reasonable and authorized in law, his action in permitting two other bus operators to route identically constructed buses over the Parkway while refusing to permit a third operator, *id est,* Washington, Virginia, and Maryland Coach Company also to operate thereupon. To me the Secretary's justification constitutes an army of words escorting a modicum of reason. His action is nothing more than arbitrary bureaucracy masquerading as reasoned judgment. I do not believe that case law permits an administrative officer, even of cabinet rank, to bestow or withhold valuable franchises with the arrogance of an emperor distributing fiefdoms.

APPENDIX B

[Filed April 13, 1967]

C.A. No. 1172-63 and C.A. 2874-63 Consolidated

Opinion

This litigation involves a complex factual background and numerous legal issues; however, one issue stands out as paramount. That issue is whether the Secretary of the Interior through his delegate, the Director of the National Park Service, has discretionary power to limit suburban commuter bus traffic on part of the George Washington Memorial Parkway while not limiting such traffic on other parts of the Parkway. This litigation involves only those parts of the Parkway which are on the Virginia side of the Potomac River. Included in this issue is whether the Secretary has exercised his discretion in a reasonable and nondiscrminatory manner under the circumstances and whether the Secretary has the authority to exact a fee from suburban commuter bus companies for such use of the Parkway as is permitted.

Annexed hereto as Appendix A is a map showing most of the Parkway. Included are the sections of the Parkway which are involved in this litigation, the site of the Central Intelligence Agency (C.I.A.), and all bridges, access roads and intersecting roads which shall be referred to in this opinion.

Also annexed hereto as Appendix B are detailed Findings of Fact and Conclusions of Law.

Pleadings and Parties

The first of these two consolidated actions was initiated by the United States, requesting injunctive relief against the Washington, Virginia & Maryland Coach Company, Inc. (W. V. & M.), restraining it from continuing its unauthorized operation of a suburban commuter bus service over the Parkway between the Key Bridge and the C.I.A.

site, the newest section of the Parkway. The United States complained that W. V. & M. only has limited permission to use the Parkway—to carry passengers to and from the C.I.A.—and therefore it is violating Park Service Regulations by adding a wide network of commuter service to and from areas of northern Virginia beyond the C.I.A. Building and by routing this commuter traffic onto the Parkway. The government contends that W. V. & M.'s use of the Parkway is substantially more extensive under its unauthorized use than it would be if the Parkway were used only as authorized to serve the C.I.A. and direct return to Key Bridge. The government asserted that the regulations which grant to suburban commuter buses only limited access to the Parkway above Key Bridge are reasonable and necessary to preserve the scenic values of the Parkway.

In answer to this complaint, W. V. & M. denied the validity of the regulations upon which the United States requested this injunctive relief, claiming that the regulations are discriminatory in that they permit all buses except suburban commuter buses to use this portion of the Parkway in connection with services rendered off the Parkway, and by permitting all kinds of buses, including suburban commuter buses, to use the portion of the Parkway below the Arlington Memorial Bridge in connection with services rendered off the Parkway. The government's contention that suburban commuter buses detract from the Parkway's scenic values was answered by a denial that such buses have any noticeable effect upon prevailing aesthetic standards on the Parkway, and that even if there is such an effect it would still be unreasonable and discriminatory to insist on the preservation of scenic standards on the Parkway above the Key Bridge but not below the Arlington Memorial Bridge. W. V. & M. also counterclaimed for a return of fees paid under protest to the National Park Service of one cent per vehicle mile. These fees, for prior use of the Parkway, amounted to $2,284.16 at the time of trial.

The D. C. Transit System, Inc., the parent corporation of W. V. & M., intervened as a defendant. Also intervening as defendants were the Washington Metropolitan Area Transit Commission (hereinafter referred to as the WMATC) and the State Corporation Commission of the Commonwealth of Virginia (hereinafter referred to as the Virginia State Commission). Although limited, the interventions of the two commissions was for the purpose of joining with the bus companies in emphasizing the legislative aspects of this litigation. The legislative element in this case concerns the issue of whether the act of September 15, 1960, (74 Stat. 1031) authorizing The Washington Metropolitan Area Transit Regulation Compact has any effect upon the powers and authority of the Secretary of the Interior or the National Park Service to regulate the kind and amount of suburban commuter bus traffic on the Parkway. The interests and contentions of the commissions and D. C. Transit are substantially identical with those of W. V. & M.

The second suit, brought by W. V. & M., raised substantially the same issues with three minor additions: first, W. V. & M. sought review of Park Service Regulations to the extent that they do not permit suburban commuter buses to travel on the Spout Run "neck" of the Parkway (a short deviation from the main Parkway route northwest of Key Bridge into Arlington proper), and between Key Bridge and Memorial Bridge (Route 50); second, W. V. & M. requested that the Secretary and the Park Service be enjoined from collecting fees for any use of the Parkway by commuter buses; and, third, D. C. Transit intervening as plaintiff sought review of Park Service Regulations to the extent that such regulations do not permit suburban commuter buses to use the northernmost part of the Parkway from the Beltway southward to the C.I.A., a stretch of about two miles. D. C. Transit presently carries suburban commuters from Maryland, who work at the C.I.A., across the Potomac River via the Cabin John Bridge on the Beltway (Interstate Route 495).. Because

present regulations preclude D. C. Transit from using the two-mile "shortcut" on the Parkway from the Beltway to the C.I.A., a longer and more indirect route must be taken by continuing west on the Beltway past the entrance to the Parkway, on to Route 193, then doubling back on Route 193 to the other C.I.A. entrance.

The parties are slightly different in the second suit. Rather than the United States, the Secretary of the Interior and the Director of the National Park Service were named as defendants. The WMATC and the Virginia State Commission were named defendants in the second action although the positions taken by them are almost identical with those taken by the plaintiff bus companies. Whatever procedural advantages may have been obtained by naming the two commissions as defendants in the second suit, the Court will now treat both bus companies and both commissions as being aligned on the same side against the United States, the Secretary of the Interior, and the Director of the National Park Service.

Background and Factual Summary

The Parkway is owned and controlled by the Federal Government. In Virginia it consists of an elongated national park running parallel to the bank of the Potomac River with a multi-lane highway as its most distinctive feature. From Mount Vernon, at its southern end, it stretches northwestward through Fairfax County, the City of Alexandria, Arlington County, and again, Fairfax County, Virginia. On its northwestern end it terminates at Interstate Route 495, the circumferential highway which forms a beltway around the major portions of the Washington metropolitan area.

For purposes of this litigation the Parkway has been referred to by various sections according to the sequence in which it was constructed. First, there is the southeastern part running from Mount Vernon through the

City of Alexandria, past the National Airport, and terminating at the Arlington Memorial Bridge (Route 50). This part of the Parkway was once known as the "Mount Vernon Memorial Highway" and was completed in 1932. The Parkway above the Arlington Memorial Bridge was added section by section. In 1937, a short stretch was completed between Memorial Bridge and Key Bridge. In December 1950, the "Spout Run" section of the Parkway was completed. This section runs northwestward from Key Bridge but after less than one mile it deviates southwestward, away from the Potomac River and goes into Arlington proper.

The final stretch of the Parkway was completed in early 1960. It begins where the Spout Run portion deviates away from the Potomac, and continues northwestward along the Potomac Gorge, terminating at the Beltway.

The building which houses the Central Intelligence Agency was completed and opened in the fall of 1961. The C.I.A. site is adjacent to the Parkway, about two miles southeast of where the Parkway terminates at the circumferential highway. The C.I.A. site is served with an access road to and from the Parkway. The C.I.A. site is also served on its opposite side by State Routes 123 and 193, which join when they reach the C.I.A. site and continue toward Washington as Route 123. Going toward the District of Columbia and after passing the C.I.A. site, Route 123 goes over the Parkway at a clover-leaf intersection below the C.I.A. site and continues southeastward between the Parkway and the Potomac, connecting with Chain Bridge into the District of Columbia.

The National Park Service views the various sections of the Parkway differently with reference to what kind of commercial traffic will be permitted. Taxicabs are permitted to travel on any portion of the Parkway without payment of any fee. Commercial trucks are not permitted on any part of the Parkway except in special cases and

consequently there is no general provision for fees as to them.

With respect to commercial buses, however, use of the Parkway depends on two factors: what kind of service the buses render, and what portion of the Parkway is involved. First, as to the kind of service rendered, sightseeing buses, and airport buses serving Dulles and National Airports, are permitted on any portion of the Parkway which is desired and needed for those particular services subject to obtaining a permit and paying a fee. There are also buses owned by the Federal Government which are used as a shuttle service between the C.I.A. and points in downtown Washington. These government-owned buses are permitted on the Parkway south of the C.I.A. without payment of a fee and in this respect are given more favored treatment than buses of W. V. & M. which are permitted the same use of the Parkway from Key Bridge to the C.I.A., but contingent upon payment of a fee of one cent per vehicle mile. Park Service Regulations prohibit W. V. & M. (or *any* suburban commuter bus company) from going beyond the C.I.A. to serve suburban residents in outlying northern Virginia, and, thus, these "C.I.A. commuter buses" operated by W. V. & M. are to be distinguished from "surburban commuter buses." In reality, therefore, any bus company (such as W. V. & M.) which operates on the Parkway to and from the C.I.A. under this special regulation, is merely operating a shuttle service for the benefit of the C.I.A. and its employees in competition with, and identical to, the government-owned shuttle service.

The second distinction made by Park Service Regulations deals only with "suburban commuter buses." Rather than depending on the kind of service which a bus renders, this distinction is based on different parts of the Parkway. For example, commuter buses which actually carry passengers between downtown Washington and points in residential areas of suburban Virginia ("suburban com-

muter buses") are allowed unlimited use of the Parkway only on the southern part between Memorial Bridge and Mount Vernon. Such buses, regardless of what company owns them, cannot operate above Memorial Bridge except for the limited "C.I.A. commuter service," without violating Park Service Regulations.

Simply stated, the regulations appear to discriminate against suburban commuter bus companies desiring to use the Parkway to serve the northern section of suburban Virginia. This is the basic complaint of the bus companies in this litigation. They want the restrictive regulations declared invalid, including the provisions which require the payment of a fee for such use of the Parkway as is now permitted or will in the future be permitted.

A few statistics will demonstrate the difference in treatment accorded suburban commuter bus companies desiring use of the Parkway above the Memorial Bridge when contrasted with the treatment accorded other bus companies rendering other kinds of passenger service over the same portion of the Parkway. Using the nine month period from January 1 to September 30, 1966, as an example, the evidence established that W. V. & M. operates an average of 52 one-way trips per day between Key Bridge and the C.I.A. This use of the Parkway includes service to outlying suburban Virginia in excess of the authority granted by Park Service permits and Regulations. Using the same period as an example, the evidence shows that Airport Transport, Inc. operates an average of about 98 one-way trips per day between Dulles Airport and a terminal in downtown Washington. These airport buses use the Parkway between Key Bridge and its intersection with Route 123 near the C.I.A. Occasionally, Airport Transport also carries passengers between Dulles and National Airports, in which event the Parkway is also used between Key Bridge and National Airport. On such occasions a limousine, rather than a bus, is generally used. The government-

owned shuttle service between the C.I.A. and Key Bridge on the Parkway also involves about 99 one-way trips per day, about 52 of which are by bus and the rest by limousine.

The most glaring example, however, of the discriminatory effect of the regulations can be illustrated by comparing the use of the Parkway above Key Bridge by W. V. & M. with the use of the Parkway below Arlington Memorial Bridge by A. B. & W. (Alexandria, Barcroft & Washington Transit Company) also a suburban commuter bus company. A. B. & W. is permitted to operate about 820 one-way trips per day on the Parkway below Arlington Memorial Bridge. It should be noted that not all of these trips cover the entire stretch between the Memorial Bridge and Mount Vernon. Many, if not most, of these trips enter or leave the Parkway between these two points; however, the fact remains that about 820 suburban commuter buses per day are permitted to travel at least some distance on the Parkway below the Memorial Bridge while carrying passengers to and from outlying suburban areas off the Parkway.

For a complete comparison between Parkway use by suburban commuter buses above Key Bridge with all other use of the Parkway by all other buses, something should be said about sightseeing buses. Between January 1 and October 31, 1966, the National Park Service issued 1224 one day permits (an average of about 4 per day) to the Gray Line in connection with its sightseeing tours A and D conducted over the Memorial Bridge—Mt. Vernon portion of the Parkway. In almost the same period (January 1st to October 19th) A. B. & W. was issued 610 sightseeing permits (an average of about 2 per day) for operations over the same portion of the Parkway. The White House Sightseeing Corporation also operates one or two daily sightseeing trips, and perhaps as many as 5 per day during the peak tourist periods, most of which are conducted over this southern portion. Finally, out-of-state carriers op-

erating over the southern portion of the Parkway are granted an indeterminate number of sightseeing permits at Mt. Vernon by the National Park Service for operations over the southern portions of the Parkway. The evidence adduced at trial indicates that very few, if any, sightseeing buses travel on the Parkway above Key Bridge.

Because an issue has been brought into this case of whether certain legislation enacted in 1960 may have modified or diminished the power of the Secretary of the Interior to regulate suburban commuter bus traffic on the Parkway, some facts as to this legislation should be stated. On September 15, 1960, the Congress of the United States gave its consent and approval (74 Stat. 1031) to a proposed interstate agreement ("Compact") between Virginia, Maryland and the District of Columbia. This Compact, finally ratified by the three signatories on December 22, 1960, established a commission, the WMATC, for the regulation of carriers of passengers between points in the metropolitan area of the District of Columbia. Under Article I of the Compact, the District of Columbia and suburban counties in Virginia and Maryland were included in a "Washington Metropolitan Area Transit District" over which the WMATC would have regulatory authority. In Virginia this District includes the City of Alexandria, the Counties of Arlington and Fairfax and that portion of Loudoun County occupied by Dulles Airport. In Maryland this District includes Montgomery and Prince Georges Counties. The District therefore includes all parts of the Parkway involved in this litigation.

The purpose of the enabling Act and Compact was the unification in one agency of all authority over commuter transit within this District which was previously vested in the several signatories and the Interstate Commerce Commission. The newly created Commission, the WMATC, was granted the power to issue certificates of public convenience and necessity, prescribe routes, set fares, and

otherwise to govern commuter bus traffic in the metropolitan area.

Another important factor is that W. V. & M. and D. C. Transit have been granted certificates by the WMATC to travel on the contested portions of the Parkway to serve suburban commuters. These certificates, however, contain a proviso that the bus companies must meet any criteria set by the Park Service. In other words, the WMATC, in prescribing a route over the Parkway, does not assume to have the power to overrule Park Service Regulations to the contrary; instead, the WMATC specifically states that it is for the bus company involved to comply with Park Service Regulations with respect to Parkway use.

This practice of the WMATC in adding a proviso to its certificates requiring the carrier to satisfy Park Service Regulations is no doubt based upon the specific language of Section 3 of the Act of Congress which authorized the Compact and the creation of the WMATC. Section 3 contains the following proviso:

> * * * *Provided further,* That nothing in this Act or in the compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities.

With respect to the fee requirement of one cent per vehicle mile for use of the Parkway by suburban commuter buses, I find that such fees are well within the limits set by other governmental authorities as to fees ("road taxes") required for use of city and state roads by commuter buses. Arlington County and the District of Columbia require fees of one cent per vehicle mile. These so-called "franchise fees" are also exacted on a mileage

basis by the City of Fairfax, the City of Falls Church, and the City of Vienna, Virginia.

Returning now to the discrimination issue, certain facts should be stated about the government's position. The government argues that the presence of suburban commuter buses on the Parkway above Key Bridge is aesthetically objectionable, *per se*, and therefore the regulations designed to limit access to the Parkway by such buses have a rational basis and are valid.

The government also points to an alternative route, via Route 123 and Chain Bridge, which W. V. & M. buses employed before the northern leg of the Parkway was completed and which is still available, although it is slower and a more circuitous route to and from downtown Washington. With respect to D. C. Transit's desire to use the two-mile shortcut to the C.I.A. at the northwest end of the Parkway, the government also points to the availability of the alternate route via the Beltway and Route 193 which D. C. Transit is presently using.

Finally, the government contends that a rational basis exists for the regulations which differentiate between the old and new sections of the Parkway (below Memorial Bridge and above Key Bridge, respectively). As to this contention the government argues that the old section below Memorial Bridge was originally a "Highway" and that only after it was authorized and construction begun was it designated as part of the George Washington Memorial "Parkway." The government further contends that when this section was constructed it partially took the place of a pre-existing commuter railway; that it was designed and constructed with bus stops; and that unlike the newer section above Key Bridge, it has many intersecting streets (without clover-leaf features) which are regulated by stop lights. In effect, the government is saying that although this old "highway" is now under the authority of the Park Service and is designated as part of a Federal

Parkway, it is historically and realistically proper for the Secretary and the Park Service to consider it and govern it as a separate entity apart from the new section of the Parkway above Key Bridge.

Apart from the availability of alternate routes, the government has not established this theory from the evidence adduced at trial. First, from the evidence I cannot find that there is anything aesthetically objectionable, *per se*, about having commuter buses on the Parkway above Key Bridge. The government has offered no valid reason which even attempts to justify a *per se* approach to this problem. In my view, a *per se* approach to solving a problem is only used when prior experiences with similar or identical problems is so convincing that evidence need not be introduced in a given instance to prove what has been proven many times in previous cases. The Court has found no such prior cases involving parkways and commuter buses and the parties have cited none.

Second, and without taking a *per se* approach, I find that the government has not proved that suburban commuter buses have any adverse effect upon scenic aspects of the Parkway at the time of day when such buses would be using it.

In this case the government's only evidence that suburban commuter buses are spoilers of parkway scenic values is a self-serving letter to that effect from the Director of the National Park Service to the WMATC dated November 2, 1962 (Government Exhibit No. 23). The statements made in that letter are opinions rather than facts; there was no opportunity afforded counsel to cross-examine the Director of the Park Service on the contents of the letter or the assumptions upon which it was based; and there was no independent evidence introduced along the same lines such as expert opinions or testimony of lay persons who were familiar with the scenic values of the Parkway.

Early in this litigation, on January 10, 1964, affidavits by Stewart L. Udall, the Secretary of the Interior, and other officials of the Department of the Interior were filed in support of the government's motion for summary judgment. That motion was denied on February 28, 1964. Since the affidavit of the Secretary was not introduced into evidence, it cannot be considered by the Court; however, even if it were evidence in this case, it would give little support to the government's position. The pertinent parts of the affidavit are as follows:

• • •

> In my judgment, it would be contrary to the public interest to allow permanent commuter bus service upon the George Washington Memorial Parkway for the purpose of transporting passengers between the Virginia suburbs and the District of Columbia. The use of this Parkway by ever-increasing numbers of commuter buses with their great bulk, trucklike characteristics, and odors, as is contemplated by the Washington, Virginia & Maryland Coach Company, would, in my opinion, physically damage the scenic value of the Parkway. Further, other routes are available for transportation of passengers between the District of Columbia and the suburbs of Northern Virginia.
>
> In my judgment, allowing permanent commuter bus service of the nature described above, would not be in the public interest, and would be inconsistent with the intendment of Congress.

• • •

In addition to the fact that this opinion was not offered into evidence, nowhere does the Secretary attempt to justify the application of these alleged public interest factors to only *part* of the Parkway. Since the affidavit shows no recognition of the fact that on a daily basis more than 800 suburban commuter buses are operated by A. B. & W. on the Parkway below the Arlington Memorial Bridge, it loses

any relevance to the issues as they are now before the Court. The basic problem in this case is no longer whether the preservation of scenic values, alone, would justify exclusion of commuter buses from the Parkway. The Court agrees that, as an abstract principle, the Secretary does have the authority to deny access by any class of commercial vehicle to all sections of the Parkway. Such a policy has been adopted by the Secretary with respect to trucks. They are not allowed on any section of the Parkway except in special cases. However, the regulations which govern suburban commuter buses employ a double standard—depending upon which part of the Parkway is involved.

I find that regardless of the historical background of the various sections of the Parkway, it is now one Parkway—not two—and that the original congressional authorization for its construction and maintenance had the effect of combining and unifying all pre-existing parts of it, together with such extensions of it as may be added thereafter, into one continuous National Parkway.

To summarize the factual situation just presented, the evidence convinces me that the Park Service Regulations here in issue, except those as to fees and those designed to protect a short stretch of the Parkway which has weak construction and cannot withstand heavy bus traffic, discriminate against suburban commuter bus companies desiring to use the Parkway above Key Bridge. The regulations discriminate between Parkway use above Key Bridge when contrasted with Parkway use below Memorial Bridge; and with respect only to the Parkway above Key Bridge there is also a double standard—one for commuter buses and the other with respect to other buses rendering similar but not identical services such as airport buses.

Discussion

The issues of discrimination and unreasonableness must be analyzed within a legal framework which is fairly clear

and about which all the parties seem to agree. The bus companies, citing *Eastern Central Motor Carriers Ass'n* v. *United States*, 239 F. Supp. 591, 594 (D.C.D.C. 1965) maintain that the allegedly discriminatory regulations must be found invalid if they are without a rational, substantial or sound basis. Other cases are cited to the same effect.[1] Reliance is also placed on Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, which contains a general prohibition against administrative regulations or orders which are either "* * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *."

The WMATC and the Virginia State Commission urge a similar standard. Citing *Sproles* v. *Binford*, 286 U.S. 374, 396 (1932), and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the commissions contend in their brief that the regulations must be declared invalid if they "lack a rational basis."

This is precisely the same test which the government seeks to have applied in this case. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Miss. Valley Barge Co.* v. *United States*, 292 U.S. 282, 286-287 (1934) (cited in the government's post-trial brief).

What the issue comes down to is this: In view of the broad discretion vested in the Secretary and the Park Service, and in view of the limited role of the reviewing Court, does the evidence show a rational basis for the regulations here in issue? I conclude that the evidence does not show a rational basis for the regulations as they now exist.

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1 *Jenkins* v. *Macy*, 237 F. Supp. 60, 62 (E.D. Mo. 1964), affirmed 357 F. 2d 62; *Irvin* v. *Hobby*, 131 F. Supp. 851, 865 (N.D. Iowa 1955); *NLRB* v. *Minnesota Min. & Mfg.*, 179 F. 2d 323, 326 (8th Cir. 1950); and *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 695 (9th Cir. 1949) *cert. denied* 338 U.S. 860, *rehearing denied*, 339 U.S. 945.

The first step in applying the "rational basis" test which the parties seem to agree upon, is a proper understanding of the facts; however, while searching the facts and circumstances of this case to find a rational basis for the regulations, just the contrary has become clear to the Court. First, the Court cannot understand how 52 daily suburban commuter buses operated by W. V. & M. could be aesthetically objectionable when approximately 200 airport and C.I.A. commuter buses of the same style and size, operating over the same route, are not aesthetically objectionable. Second, the Court cannot understand how the government can, in good faith, request injunctive relief against these 52 daily bus trips when the Park Service allows more than 800 daily trips below Memorial Bridge by buses with identical physical characteristics and performing an identical service. Even without more, these facts establish the allegations that the regulations lack a rational basis and that they are discriminatory, unreasonable and therefore invalid.

The government, perhaps anticipating the Court's rejection of its contention that "preservation of scenic values" is, *per se*, a rational basis for the regulations, sought to establish that the Parkway is a scenic Parkway only above Key Bridge, with an older, multiple access "Highway" tacked onto its southern extremity. In addition to my finding that this is factually not true, the evidence establishes the contrary. In direct conflict with this contention is the fact that literally thousands of sightseeing bus trips are made every year on the Parkway south of the Memorial Bridge but that very rarely do any of them travel on any portion of the Parkway above Memorial Bridge. The activity of these sightseeing buses is strong evidence, contrary to the government's contention, that the Parkway below Memorial Bridge is a scenic attraction which equals and perhaps surpasses the newer section above Key Bridge.

In my opinion, the Secretary and the Park Service are "clearly wrong" and the weakness of the "scenic values"

argument is "so manifest that the Court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the Act of Congress."[2]

In addition to the foregoing, something should be said about certain aspects of this case which may not be clearly presented on the record. The Court received the impression that there is more to this controversy than meets the eye. Because of the peculiar or unusual nature of certain cases it is often difficult to understand the "theory" upon which the respective parties are proceeding; however, in this case there were too many inferences to be drawn from the evidence—all pointing to the same problem—for the Court not to comment. My comments are also intended as an assurance to the parties that certain elements of the case did not go unnoticed by the Court.

The "buried problems" involves the whole question of adequate highways and mass transit facilities to handle the large and growing volume of commuter traffic in the District of Columbia metropolitan area. The problem is most acute in the Virginia suburbs because traffic to and from the District of Columbia must squeeze onto a few bridges across the Potomac River. This case presents a unique

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[2] Quoting from *Boski* v. *Comingore*, 177 U.S. 459, 470 (1900) (cited in the government's post-trial brief). The Act of Congress which is relevant here is the Act of August 25, 1916 (39 Stat. 535 as amended, 16 U.S.C. §§ 1, 3) which directs the Secretary of the Interior and the National Park Service to

> "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U.S.C. § 1).

This Act also authorized the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." (16 U.S.C. § 3).

aspect of this problem because the Parkway provides direct access to Key Bridge, Theodore Roosevelt Memorial Bridge, Arlington Memorial Bridge and the "14th Street" Bridge, all of which provide Virginia commuters with direct access to the downtown area of the District of Columbia. The motion pictures which are in evidence amply support a finding of which the Court could take judicial notice anyway; that however one might view it, the Parkway is an extremely heavily travelled commuter highway. To the thousands of commuters who use it and to the officials who must regulate it, it is not a scenic parkway during weekday rush hours and no amount of wishful thinking can make it so without a drastic highway building program in suburban Virginia to ease the load on the Parkway.

The significance of this state of affairs is that the Secretary may have reasons quite a part from what he calls "scenic values" for the strange and discriminatory set of regulations which now prohibit suburban commuter buses from the northern portion of the Parkway. I seem to detect an implied warning, directed across the Potomac toward Virginia, and also toward the WMATC, that the Parkway cannot be relied upon, as it has been in the past, as a route to be used for easing the mounting pressure of commuter traffic, including mass transit, in lieu of new highways being opened.

I mention this latent element in this case because there undoubtedly must be more to the government's position than the "scenic values" and "old highway-new parkway" arguments which have been relied upon. These two theories do not have substantial evidence in the record to support them and they do not provide a rational basis for the unfair and discriminatory double standard regulations which presently apply to the suburban buses using the Parkway. These, nevertheless, are the contentions advanced by the government and I have no alternative but to invalidate this regulatory pattern in the absence of a rational basis in the evidence of record.

The government, on the other hand, has demonstrated a rational basis for the fee requirement which applies to buses using the Parkway and to the prohibition against buses traveling on the structurally weak section of the Parkway between Key and Memorial Bridges. The cost of maintenance is a substantial and rational basis for these two aspects of the Parkway regulatory pattern.

As to the counterclaim by W. V. & M. in Civil Action No. 1172-63 (the first of these two actions, wherein the United States is plaintiff) requesting a return of $2,284.16 representing fees paid by W. V. & M. up to the time of trial, the Court concludes, as an alternative reason for denying this particular request, that it is without jurisdiction. This counterclaim is a demand against the United States and even though it is under $10,000.00 it does not state a claim under the Tucker Act, 28 U.S.C. § 1345 (a) (2), because it is not based on either an express contract or a contract implied in fact. It is therefore a claim for damages against the government without the government having given its consent to be sued. See *Cobb* v. *Shore,* 87 U.S. App. D.C. 162, 183 F. 2d 980 (1950); *Alabama* v. *United States,* 282 U.S. 502, 506 (1931); *United States* v. *Minnesota Mutual Investment Co.,* 271 U.S. 212, 217 (1926).

The Court concludes therefore that the Regulations of the Park Service are valid and have a rational basis except for those which deny W. V. & M. and D. C. Transit unlimited access to the Parkway above Key Bridge for their suburban commuter buses. So long as the regulations permit unlimited commuter bus use of the Parkway below Arlington Memorial Bridge, permits for such traffic above the Key Bridge must also be granted.

The regulations may exclude *all* commuter buses from the Parkway, but access or exclusion must not be discriminatory. Such regulations could permit such traffic only during certain hours of the day or during all hours of the day, but whenever granted the present distinctions between

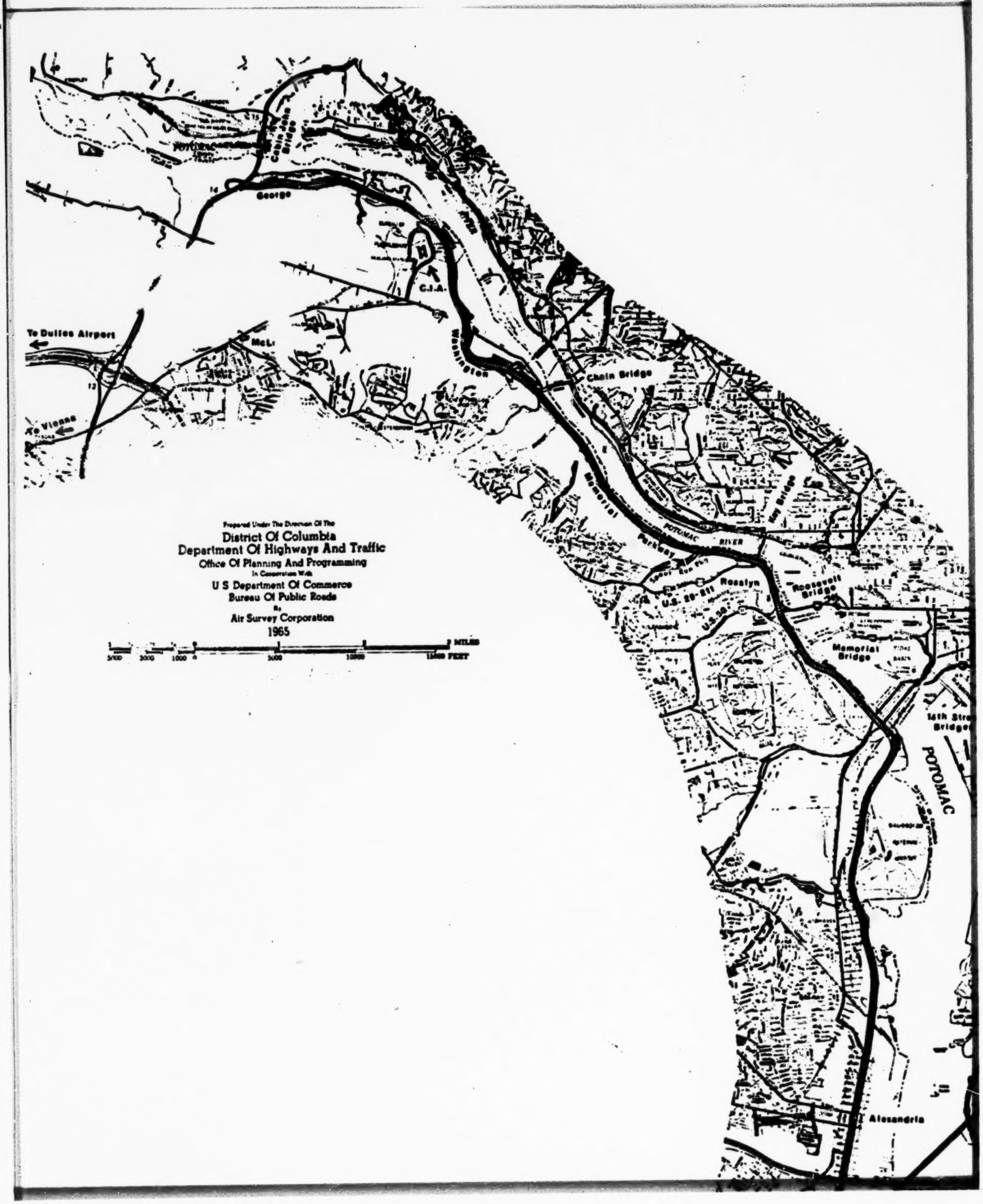
buses using the northern and southern portions of the Parkway cannot be part of the regulatory pattern.

This opinion, together with the detailed Findings of Fact and Conclusions of law annexed hereto as Appendix B shall constitute all of the findings of fact and conclusions of law in this case.

Counsel will submit an appropriate order.

/s/ JOHN J. SIRICA
United States District Judge

April 13, 1967



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Office Of Planning And Programming
In Cooperation With
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Bureau Of Public Roads
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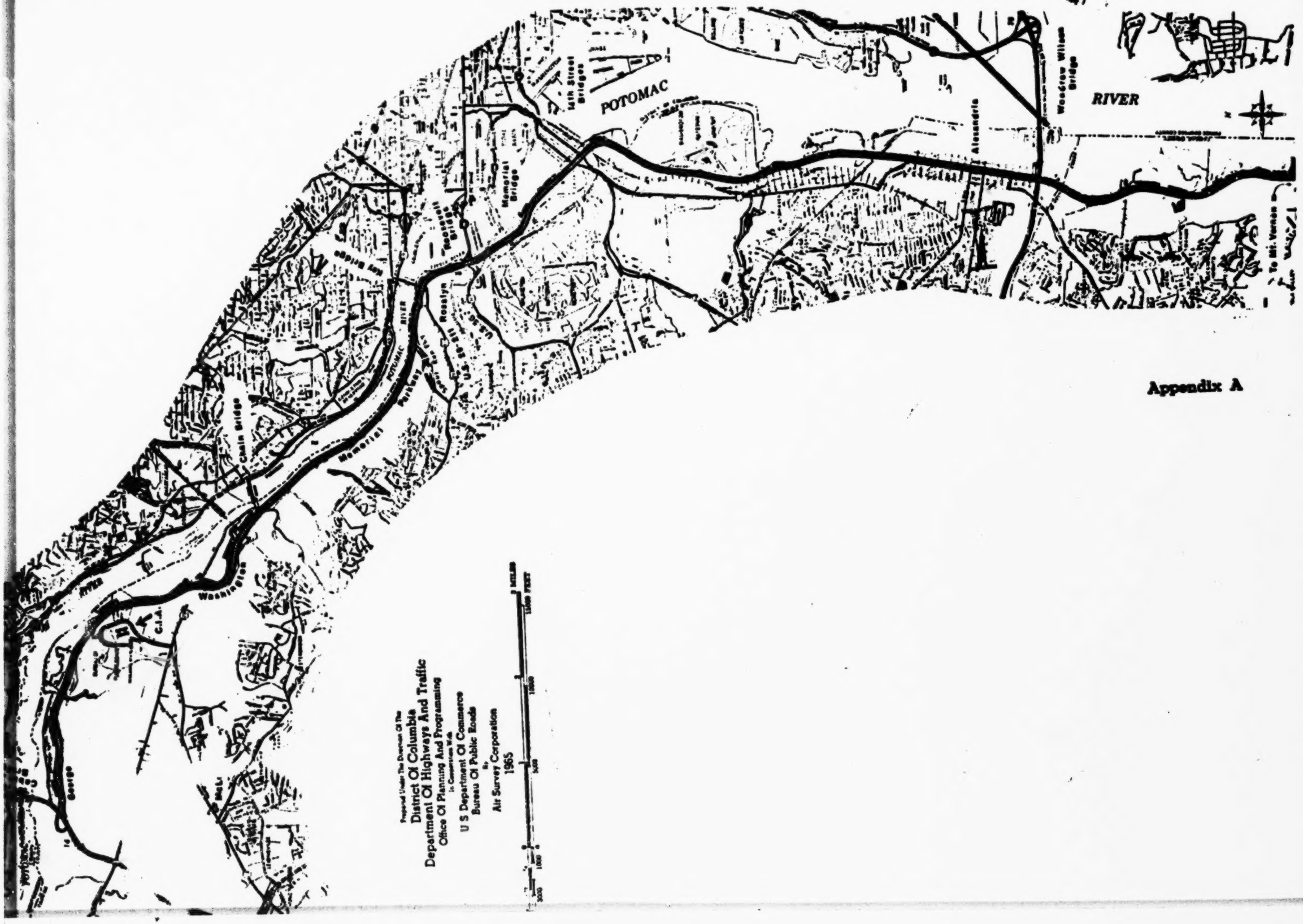
POTOMAC
RIVER
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Appendix A

[Filed April 13, 1967]

FINDINGS OF FACT

(1) Title to the George Washington Memorial Parkway is vested in the United States. Administration of the Parkway is a responsibility of the National Capital Region of the National Park Service under the jurisdiction of the Secretary of the Interior. The Act of August 25, 1916 (39 Stat. 535, as amended, 16 U.S.C. § 3), authorized the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service."

(2) Pursuant to Section 1 of the Act of August 25, 1916 (39 Stat. 535, 16 U.S.C. § 1), the National Park Service is directed to "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

(3) Following the opening of the George Washington Memorial Parkway from Spout Run to the C.I.A. Building on November 3, 1959, the Department of the Interior, on December 30, 1959 (24 Fed. Reg. 11019), adopted the following regulation [36 C.F.R. (1960 Rev.) 3.36(b)(2)], with particular reference to the operation of commuter buses on the Parkway:

> Passenger carrying buses for hire or compensation shall be permitted on the George Washhington Memorial Parkway upon application for, and the granting of a permit by the Superintendent, National Capital Parks, issued on an annual basis, effective from April

> 1 until the following March 31, at the rate of $3 for each passenger-carrying seat in every vehicle so operated. Such permits may be issued (i) to provide passenger service on any portion between Mount Vernon and the Arlington Memorial Bridge, (ii) to provide limited direct non-stop passenger service between Key Bridge and the Central Intelligence Agency at Langley, Virginia, and (iii) to provide limited direct non-stop passenger service between the interchange at Route 123 and the Central Intelligence Agency Building at Langley, Virginia.

Subsequent to the publication of these regulations, the W. V. & M. Coach Company, on February 15, 1960, petitioned the Secretary for a modification thereof and a hearing on the petition. Such hearing was held on February 29, 1960; however, no report containing findings of fact, conclusions of law, or orders was ever served on W. V. & M.

(4) On April 18, 1960, the Interstate Commerce Commission[1] issued a certificate of public convenience and necessity to W. V. & M. to provide commuter bus service to the C.I.A. Building. This permit authorized W. V. & M. to travel over the Parkway between Arlington Memorial Bridge (Route 50) and the C.I.A. Building and it authorized bus travel over the Spout Run Parkway. A restriction in the permit stated that:

> The authority granted herein is subject to compliance by said carrier with any rules, regulations, or requirements which may be by law maintained or adopted by the Secretary of the Interior in connection with his administrative jurisdiction over matters relating to national parks.

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[1] The WMATC had not yet been created, thus, the I.C.C. still had jurisdiction over the commuter service rendered by W. V. & M. between Virginia and the District of Columbia.

(5) With the opening of the C.I.A. Building in the fall of 1961, W. V. & M. applied for a permit to "initiate express bus service over the George Washington Memorial Parkway to the C.I.A. Building at Langley, Va." Pursuant to the foregoing regulation, a Park Service permit was issued authorizing use of the Parkway, as requested, to furnish service to and from the C.I.A. Building only. The pertinent provisions of this permit were as follows:

> Permission is granted to operate buses on the following portions of the George Washington Memorial Parkway in accordance with existing regulations:
>
> 1. To provide limited direct non-stop passenger service between Key Bridge and the Central Intelligence Building at Langley, Virginia.
>
> 2. To provide limited direct non-stop passenger service between the interchange at Route 123 and the Central Intelligence Building at Langley, Virginia.

(6) For a short period of time in late 1961, W. V. & M. operated a bus service, as authorized by the Park Service permit and regulations, from downtown Washington to the C.I.A. Building and return. At this time, W. V. & M. provided suburban commuter bus service from the northern Virginia area to Washington by a scheduled route that proceeded down Highway 123, over the Parkway at a clover-leaf intersection, across Chain Bridge into the District of Columbia, and thence to downtown Washington.

(7) In the summer of 1962, it was ascertained that W. V. & M. had ceased to use the Parkway solely for commuter service to the C.I.A. Building. Instead, suburban commuters were picked up in Washington whose destination was beyond the C.I.A. Building, and these buses, after stopping at the C.I.A. Building, would proceed beyond that point into suburban Virginia to discharge passengers. On return runs, suburban commuters would be picked up by a bus that would stop at the C.I.A. and then proceed down

the George Washington Memorial Parkway into Washington. Although the scheduled route via Route 123 and Chain Bridge was still used by W. V. & M., the unauthorized increase in Parkway use lessened the use of Route 123 and Chain Bridge.

(8) On November 16, 1962 (27 Fed. Reg. 11346), the applicable regulation [36 C.F.R. (1966 Supp.) 3.36(b)(3)(i)] was amended. The provision relating to commuter buses was altered slightly to make clear that the service to the C.I.A. was to a "terminus" at the C.I.A. Building, with "direct return." In other words, this amendment was designed to make sure that W. V. & M. knew it was not authorized to use the Parkway for carrying passengers picked up or to be discharged beyond the C.I.A. Building.

(9) On November 16, 1962, a revised Park Service permit was issued to W. V. & M. to be effective until June 30, 1963. This permit merely modified the language of the previous permit to reflect the changes in the applicable regulation, that is, to plainly state that the Parkway use was limited to a "terminus" at the C.I.A. Building and "direct return" to Key Bridge.

(10) On December 14, 1962 W. V. & M. petitioned the Secretary for a modification of these regulations and for a hearing. This petition was denied on March 14, 1963, without explanation or further elucidation of the reasons for restricting commuter buses on the Parkway above Key Bridge. Meanwhile, W. V. & M. did not accept the revised permit and has since, despite objections made by representatives of the Department of the Interior, continuously exceeded the terms of the permit and the regulations by operating buses on the George Washington Memorial Parkway which carry suburban commuters and not limited to providing service only to the C.I.A. Building and direct return. For example, W. V. & M.'s Route 5-C picks up passengers as far away as Seven Corners, Virginia. This route, instead of proceeding east to the District of Colum-

bia down U. S. Highways 29 and 211 through the center of Arlington and across Key Bridge, goes the opposite direction on those highways and eventually proceeds down Route 123, and the Parkway, to Key Bridge.

(11) On October 27, 1964, the WMATC issued a certificate of public convenience and necessity to W. V. & M., covering the Route 5-C, which prescribed use of the Parkway for transporting commuters to and from a large area of Northern Virginia. This certificate contained the following statement: "It is for the carrier to meet any requirements adopted by the Signatories and the Park Service pursuant to their 'normal and ordinary' police powers." Without meeting such requirements, W. V. & M. is, nevertheless, operating its Route 5-C as authorized only by the WMATC while contending that its failure to comply with Park Service Regulations is due to the invalidity of the regulations.

(12) For its part, D. C. Transit has authority from the WMATC to operate over the portion of the Parkway between the C.I.A. site and the Beltway (Interstate 495); however, the Park Service has refused to permit such operations. D. C. Transit, while objecting to this refusal by the Park Service, has refrained from using the Parkway.

(13) The regulations of the National Capital Region of the National Park Service (36 C.F.R. 3.36) authorize the issuance of general unlimited permits for commuter bus service on that portion of the Parkway between Mount Vernon and the Arlington Memorial Bridge. This unlimited use is in contrast to the limited use permitted north and west of the Key Bridge. The regulations also permit concession-authorized nonscheduled bus service to Dulles and National Airports for the accommodation of air travelers. Airport Transport, Inc., by a concession agreement with the Federal Aviation Authority, provides nonscheduled, direct, nonstop service between Dulles and downtown Washington, and between Dulles and National Airports for

the accommodation of air travelers in the Washington area. Portions of the Parkway are used to provide this service to air travelers and Airport Transport holds a permit in connection with this use of the Parkway. The regulations also allow sightseeing buses to use any portion of the Parkway at any time upon obtaining a permit and payment of fees. The airport and sightseeing buses are not limited in their use of the Parkway to certain portions thereof; however, as a practical matter, almost all sightseeing bus traffic is south and east of the Arlington Memorial Bridge.

(14) The regulations of the Secretary of the Interior, since their amendment on December 30, 1959 [24 Fed. Reg. 11019, 36 C.F.R. (1960 Rev.) 3.36(b)(2)], have not authorized the issuance of a permit to W. V. & M. to use the Parkway between Key Bridge and Arlington Memorial Bridge (Route 50). In practical effect, this means that buses providing direct service to and from the C.I.A. Building or suburban commuter service to outlying areas must enter and leave the District of Columbia via Key Bridge rather than via the Roosevelt Bridge or the Arlington Memorial Bridge. These latter two bridges provide a quicker and more direct route between certain parts of suburban Virginia and much of the downtown area of Washington than does the Key Bridge. In addition, the regulations do not permit the operation of commuter buses down the Spout Run part of the Parkway which has the practical effect of requiring the buses which would otherwise use this section of the Parkway to use slower routes to reach either Key Bridge, Roosevelt Bridge or the Arlington Memorial Bridge.

(15) The section of the Parkway between the Key Bridge and the Arlington Memorial Bridge was constructed in 1937 and it does not have the same subsurface strength that underlies other portions of the Parkway. It is subject to seepage from the adjacent hillsides and breaks easier under the stresses of heavy traffic. It has been a mainte-

nance problem and today shows evident signs of constant cracking and patching. It is considered by the Interior Department and the Park Service as not being capable of withstanding heavy bus traffic. At present no commuter buses are allowed on this portion of the Parkway. The limited amount of travel by Airport Transport, Inc. on this section is almost exclusively by limousine rather than by heavy buses. Sightseeing buses rarely use this or any other part of the Parkway above the Arlington Memorial Bridge.

Conclusions of Law

(1) The Court has jurisdiction over all claims and counterclaims except for the counterclaim of W. V. & M. in Civil Action No. 1172-63 for the return of fees in the amount of $2,284.16 which have already been paid for the use of the Parkway.

(2) Park Service Regulations requiring the present and future payment of fees of one cent per vehicle mile for use of the Parkway by suburban commuter buses are reasonable, within the authority of the Secretary of the Interior to promulgate, have been adopted pursuant to the inherent police powers of the Secretary to regulate and maintain a government-owned national park, and they apply equally to all buses of the same class and therefore are not discriminatory. Thus, the claims seeking injunctive relief or declaratory injunctive relief against the Secretary of the Interior and the Regional Director of the National Park Service restraining them from present and future collection of fees are without merit and the Secretary of the Interior and the Regional Director of the National Park Service will not be enjoined from collecting such fees for such present and future use of the Parkway by suburban commuter buses as may be permitted.

(3) With respect to the counterclaim of W. V. & M. in the first action (Civil Action No. 1172-63) for the return of

fees already paid, although the Court concludes that it has no jurisdiction over this counterclaim because it is a non-contractual money claim against the government without the government's consent to be sued, the Court also concludes, *assuming* it has jurisdiction, that the regulations pursuant to which these fees were paid were within the authority of the Secretary of the Interior to promulgate, they were adopted pursuant to the inherent police powers of the Secretary to regulate and maintain a government-owned national park, and they were applied equally to all buses of the same class and therefore they were not discriminatory. Thus, this counterclaim is without merit.

(4) The Act of September 15, 1960 (74 Stat. 1031, 1037), creating the Washington Metropolitan Area Transit Commission (the WMATC) with authority to issue certificates of public convenience and necessity and to prescribe routes with respect to transportation for hire by motor vehicles in the Washington Metropolitan District, did not revoke by implication or supersede the authority of the Secretary of the Interior to promulgate reasonable regulations with respect to administration and use of the George Washington Memorial Parkway.

(5) The issuance of a certificate of public convenience and necessity by the WMATC authorizing a route over the George Washington Memorial Parkway is not in itself sufficient to permit operations on the Parkway. Use of the Parkway pursuant to such certificate is conditioned upon compliance with reasonable regulations promulgated by the Secretary of the Interior regarding such use and it is also conditioned upon the reasonable exercise of discretion by the Secretary of the Interior through the National Park Service in issuing permits for such use according to such reasonable regulations.

(6) The National Park Service Regulations promulgated by the Secretary of the Interior are unreasonable, arbitrary, capricious, discriminatory, and therefore invalid,

insofar as they do not permit suburban commuter buses owned W. V. & M. and D. C. Transit to operate without limitation on the Parkway above the Key Bridge including the Spout Run section pursuant to their certificates from the WMATC. The regulations are unreasonable, arbitrary, capricious, discriminatory and therefore invalid insofar as, and so long as, other regulations do permit suburban commuter buses owned by other bus companies to operate without limitation of the Parkway below the Arlington Memorial Bridge.

(7) To the extent that the Park Service Regulations are unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, by allowing commuter buses to operate on the southern part of the Parkway but not on the portions above the Key Bridge, so, too, is any refusal of the Secretary of the Interior or any of his delegates, to issue permits to W. V. & M. and D. C. Transit for unlimited access to the Parkway above Key Bridge basing such refusal on such unreasonable, arbitrary, capricious, discriminatory, and invalid regulations.

(8) The claim of the United States in Civil Action No. 1172-63 for injunctive relief against W. V. & M. will be denied, and the claims of W. V. & M. and D. C. Transit seeking a declaration of invalidity as to the regulations which deny their suburban commuter buses unlimited access to the Parkway north of Key Bridge will be granted because such regulations are invalid and will be invalid *so long as* they remain unreasonably discriminatory by allowing commuter buses unlimited access to the Parkway below Arlington Memorial Bridge while denying unlimited commuter bus use of the Parkway above the Key Bridge.

(9) The National Park Service Regulations promulgated by the Secretary of the Interior which do not permit *any* suburban commuter buses to use that section of the Parkway between the Arlington Memorial Bridge and the Key Bridge are reasonable and valid because of structural weak-

ness and maintenance problems, but only *so long as all buses,* including sightseeing buses and airport buses (not including limousines), are similarly denied access. Accordingly, the claims of W. V. & M. seeking a declaration of invalidity as to the regulations which deny its suburban commuter buses any access to this portion of the Parkway will be denied.

(10) All parties shall bear their own costs.

/s/ JOHN J. SIRICA
United States District Judge

April 13, 1967

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed June 9, 1967]

C.A. Nos. 1172-63 and 2874-63

Order

These consolidated actions came on for trial without a jury, and upon consideration of all the oral testimony, documentary evidence, legal memoranda, the Court's Findings of Fact, Conclusions of law and Opinion filed herein on April 13, 1967, and also in consideration of the arguments of counsel upon proposed orders on May 19, 1967, it is by the Court, this 9th day of June, 1967,

ORDERED, ADJUDGED AND DECREED, in Civil Action No. 1172 63, that the Regulations of the National Capital Region, National Park Service, as amended December 30, 1959, and November 16, 1962, are discriminatory, invalid and inoperative insofar as they do not permit suburban commuter buses owned by the Washington, Virginia and Maryland Coach Company, Inc. and the D. C. Transit System, Inc. to operate without limitation on the George Washington Memorial Parkway in the State of Virginia above Key Bridge pursuant to their certificates from the Washington Metro-

politan Area Transit Commission. The regulations are discriminatory, invalid and inoperative insofar as, and so long as, suburban commuter buses owned by other bus companies are allowed to operate without limitation on the Parkway below the Arlington Memorial Bridge, an it is further

ORDERED that the request of the United States for an injunction and declaratory judgment against the Washington, Virginia and Maryland Coach Company, Inc. be, and the same hereby is denied, and it is finally

ORDERED that the request of the Washington, Virginia and Maryland Coach Company, Inc. for a refund of $2,284.16 be, and the same hereby is, denied.

And it is ORDERED, ADJUDGED AND DECREED, in Civil Action No. 2874-63, that the Regulations of the National Capital Region, National Park Service, as amended December 30, 1959, and November 16, 1962, are discriminatory, invalid and inoperative insofar as they do not permit suburban commuter buses owned by the Washington, Virginia and Maryland Coach Company, Inc. and the D. C. Transit System, Inc. to operate without limitation on the George Washington Memorial Parkway in the State of Virginia above Key Bridge pursuant to their certificates from the Washington Metropolitan Area Transit Commission. The regulations are discriminatory, invalid and inoperative insofar as, and so long as, suburban commuter buses owned by other bus companies are allowed to operate without limitation on the Parkway below the Arlington Memorial Bridge, and it is further

ORDERED that all requests for affirmative relief are denied.

/s/ JOHN J. SIRICA
United States District Judge

APPENDIX C

Act of August 25, 1916 (39 Stat. 535 as amended, 16 U.S.C. §§ 1, 3) which directs the Secretary of the Interior and the National Park Service to

> "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U.S.C. § 1).

This Act also authorized the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." (16 U.S.C. § 3).

APPENDIX D

27 Fed. Reg. 11346,

2. Section 3.36(b) is amended to read as follows:

(b) *George Washington Memorial Parkway; passenger-carrying vehicles; permits, fees.* • • •

• • • • • • • •

(3) Passenger-carrying vehicles for hire or compensation, other than those to which subparagraphs (1) and (2) of this paragraph apply, may be permitted on the George Washington Memorial Parkway upon application for, and the granting of a permit by the Regional Director, National Capital Region, National Park Service under the following conditions:

(i) When operating on a regular schedule (*a*) to provide passenger service on any portion between Mount Vernon and the Arlington Memorial Bridge, (*b*) to provide limited direct nonstop passenger service from Key Bridge to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return, and (*c*) to provide limited direct nonstop passenger service from the interchange at Route 123 to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return. Permittees shall file a schedule of operation and all schedule changes with the office of National Capital Region showing the number of such vehicles and total miles to be operated on the parkway.